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ABSTRACT

This bulletin addresses challenges facing school administrators and local and state officials in implementing the Americans with Disabilities Act (ADA). The purpose of the ADA is stated, and dates that various provisions become effective are noted. The relationship of the ADA to Section 504 of the Rehabilitation Act of 1973 and to the Individuals with Disabilities Education Act is explored. Categories of individuals protected under the ADA are described. The ADA is then examined by title. Title I on employment focuses on determination of essential job functions in the education field, provision of reasonable accommodations, and use of medical examinations and drug testing. Title II on public services discusses prohibition of discrimination by state and local governments in provision of special education services, and enforcement by the Office for Civil Rights. Title III on public accommodations and services operated by private entities explores such discrimination as denial of participation or participation in unequal benefit, and the implications of these provisions for both public and private schools. Subsequent sections note the implications of Title IV on telecommunications and Title V which excludes from ADA persons engaged in illegal drug use. A section of general implications and recommendations concludes the bulletin. (JDD)

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The Americans with Disabilities Act: New Challenges and Opportunities for School Administrators

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1990 Civil Rights Law has Implications for Public and Private Schools

The ADA is a comprehensive civil rights law that demands and enforces the non-discrimination of persons with disabilities. It does not change or diminish any of the existing provisions of federal law protecting individuals with disabilities. However, it does augment existing law in several fashions, some of which have direct implications for both public and private school educators.

The ADA provides a legal framework that will allow individuals with disabilities to participate in all aspects of American society and to have equal opportunity to achieve the rewards that our nation offers. It allows these individuals to have the same opportunities as persons without disabilities.

As stated in the statute, the purpose of the ADA is:

"1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3) to ensure that the Federal government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities;

4)to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

When does the ADA become effective?

The Act was signed into law on July 26, 1990. There are different effective dates for enforcement under the four different Titles of the Act.

The provisions relating to employment (Title I) become effective on July 26, 1992. Title II (prohibiting discrimination in the provision of public services) becomes effective January 26, 1992, except that prohibitions against discrimination to use commuter rail services is already in effect. Title III, relating to non-discrimination by private entities providing public services became effective January 26, 1992. However, this effective date does not apply to requirements under the Act relating to new construction. Those provisions become effective July 26, 1992 for businesses with no more than 25 employees, and becomes effective January 26, 1993 for businesses with ten or fewer employees.

The Americans with Disabilities Act (ADA) began taking effect on January 26, 1992. While the statute is aimed at protecting the rights of individuals with disabilities in all pursuits in American society, there are particular implications for educators at local and state levels. This paper addresses some of the challenges facing school administrators and local and state officials in implementing this new federal law.

NASDSE appreciates Kenneth Terrell for his work in preparing this *Bulletin*. Mr. Terrell, an attorney in Washington, D.C, was formerly with the United States Department of Education, serving both in the Office of the Secretary as Senior Policy Advisor and as a program analyst in the Chapter 1 program. He also served for two years as the Executive Director of the National Association of Private Schools for Exceptional Children (NAPSEC).

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What is the relationship of the ADA with Section 504 and IDEA?

From an overall perspective, the educator must keep in mind that the ADA does not diminish any of the rights of individuals with disabilities that exist currently under Section 504, P.L. 94-142 and the Civil Rights Act of 1991.

Much of the language in the ADA is based on Section 504. Both laws stress the concept of equal opportunity, not merely equal treatment, to eliminate discrimination. To achieve this result, both statutes require covered entities to make special accommodations or modifications in their policies and practices which will allow people with disabilities to have the same opportunities as people without disabilities.

The ADA does create a higher standard of non-discrimination than does Section 504 in several respects, most importantl::

Section 504 applies only to recipients of federal financial assistance; the ADA applies to employment, public services, transportation and public accommodations regardless of whether federal funding is received.

Section 504 covers "qualified individuals with handicaps"; ADA adds to the definition by protecting individuals related to or associated with a person with a disability.

As under existing law, public schools must provide equal access to its educational program for individuals with disabilities both physically and educationally. The local education agency must provide a free and appropriate public education to all children with disabilities in the least restrictive environment. This provides a presumption that the least restrictive environment for these students to be a regular classroom setting. Where such an environment would be inappropriate, however, alternative arrangements must be made to insure an appropriate education for the child with disabilities, including separate classes or separate facilities.

While these responsibilities have previously existed for schools, it should be noted that the ADA has greatly increased expectations among the public concerned with non-discriminatory treatment of persons with disabilities. This means that, in general, educators at all levels must be much less reactive to the legal pressures and liabilities in serving and providing access to individuals with disabilities. As will be discussed later in this paper, this applies to both children and adults.

"Although the Americans with Disabilities Act is modeled after Section 504, prohibiting discrimination against individuals with disabilities, the enactment of the ADA has increased expectations of these individuals and heightened their awareness of their rights under federal law. The desire of these individuals to greater participation in society will be felt in all sectors of society, including education." —

Patricia Morrissey, Vice-President, Employment Advisory Services, Inc., (Former Senior Legislative Assoc. U.S. House of Representatives Committee on Education and Labor)

Who is covered under the ADA?

The ADA protects three categories of individuals with disabilities:

1) Individuals who have a physical or mental impairment that substantially limits one or more major life activities;

2) Individuals who have a record of a physical or mental impairment that substantially limited one or more of the individual's major life activities; and

3) Individuals who are regarded as having such an impairment, whether they have the impairment or not.

The first category of persons covered by the definition of an individual with a disability is restricted to those with "physical or mental impairments." Physical impairments include --

1) Physiological disorders or conditions;
2) Cosmetic disfigurement; or
3) Anatomical loss

Mental impairments include mental or psychological disorders, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

To constitute a "disability," a condition must substantially limit a major life activity. Major life activities include such activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The ADA protects not only those individuals with disabilities who actually have a physical or mental impairment that substantially limits a major life activity, but also those with a record of such an impairment. This protected group includes --

1) A person who has a history of an impairment that substantially limited a major life activity but who has recovered from the impairment. Examples of individuals who have a history of an impairment are persons who have histories of mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer.

2) Persons who have been misclassified as having an impairment. Examples include persons who have been erroneously diagnosed as mentally retarded or mentally ill.

The ADA also protects certain persons who are regarded by a public entity as having a physical or mental impairment that substantially limits a major life activity, whether or not that person actually has an impairment. Three typical situations are covered by this category:

1) An individual who has a physical or mental impairment that does not substantially limit major life activities, but who is treated as if the impairment does substantially limit a major life activity.

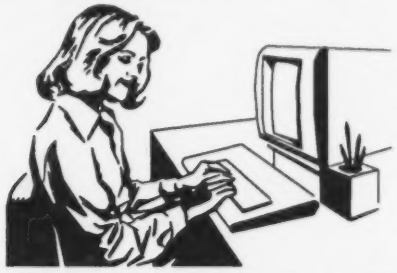
Drug addiction is an impairment under ADA. However, a public entity may base a decision to withhold services or bene-

fits on the fact that an addict is currently engaged in the use of illegal drugs. The Act does protect from discrimination a person who has successfully completed a supervised rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in the use of illegal drugs.

Effective Dates		
Title I	Business with 25 or more employees	July 26, 1992
	Businesses with 15 or more employees	July 26, 1994
Title II	General	January 26, 1992
	Intercity & Commuter Rail	July 26, 1990
Title III	General	January 26, 1992
	Civil Actions against businesses with 25 or fewer employees	July 26, 1992
	Civil Actions against businesses with 15 or fewer employees	January 26, 1993
Title IV	Telecommunications Relay Services	July 26, 1993
	Closed Captioning	July 26, 1990

Further, the Act does not consider homosexuality to be a disability for the purpose of protection under the ADA.

TITLE I: EMPLOYMENT



Reasonable Accommodations Required of Employers for Persons with Disabilities

Title I prohibits, with certain exceptions, discrimination against individuals with disabilities. As under Section 504, an employer or prospective employer must make reasonable accommodations to allow individuals with disabilities the opportunity for employment.

Any individual is covered under the employment provisions of the ADA who 1) has a disability; and 2) can, with or without reasonable accommodation perform the essential functions of the employment position that such individual holds or desires. The regulations implementing Title I further define "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual".

What is reasonable accommodation?

Reasonable accommodation includes 1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities, and 2) may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of qualified readers or interpreters. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

Accommodations that would entail undue hardship on the employer are not required.

What is undue hardship?

Generally, "undue hardship" means an action requiring significant difficulty or expense, when considered in light of certain factors identified in the Act. Generally these include:

- the nature and cost of the accommodation
- the overall financial resources of the facility
- the size of the facility in terms of employees
- the type of operation of the covered entity

However, the regulations make clear that an employer would have to show substantially greater difficulty or expense in providing a reasonable accommodation than would be required under Title VII of the Civil Rights Act. Further, it is difficult to imagine that a school could be considered a type of operation that, by providing a reasonable accommodation to a person with a disability, would be unduly disrupted.

What are essential job functions?

Essential job functions are any fundamental duties involved in a particular position. A job function is essential if 1) the job exists to perform the specific function at issue, 2) only a limited number of employees are available among whom the job function can be distributed, or 3) the function is highly specialized.

Factors included in determining whether a function is essential include 1) the employer's judgment, 2) written job descriptions, 3) time spent performing the function 4) consequences of not performing the function, and 5) the terms of a collective bargaining agreement.

What are the implications for educators under Title I?

1) Job Qualifications

As is the case with any employer, the school administrator is entitled to determine the essential functions of a particular position. This is crucially important in determining whether someone is a "qualified individual with a disability" under the

Act. The Act also states that a written job description is evidence of the essential functions of the position.

However, the regulations emphasize that the job description is one factor among all relevant evidence in determining whether a particular function is essential. Therefore, it is advisable that the school administrator carefully define the duties of any position to be filled in a written form before advertising to fill a vacant position, and carefully distinguish between those duties of the position that are essential and which are marginal.

The ADA prohibits discrimination in all employment practices....

It should also be noted that, in filling employment positions involving counseling or cognitive skills, it is extremely dangerous to attempt to quantify standards for employment that effectively exclude individuals with disabilities.

2) Reasonable Accommodation

The requirement that employers provide reasonable accommodation to qualified individuals with disabilities creates significant challenges for the school administrator. It is important to remember that the reasonable accommodation provisions apply to both pre-employment and post-employment circumstances.

In terms of the employment application process, the school administrator must make arrangements for qualified individuals with disabilities to have equal opportunity to apply for a vacant position. For example, if an interview is a part of the selection process, it may be necessary to arrange for sign interpreters to allow a person with a hearing disability to effectively apply for a particular position. If a written examination is required, it may be necessary to provide a reader to accommodate the participation of a person with a visual impairment to participate.

Also, during the pre-employment stage, it will be necessary to contemplate accommodations that will be required for the qualified individual with a disability to perform the functions of the position, if selected. The regulations suggest that the best method for accomplishing this, is through direct conversation between the prospective employer and the individual. The individual with a disability may suggest a particular accommodation and the employer can assess the needs of the individual through such a pre-employment conference. The EEOC guidance accompanying the regulations recommends the following process:

1) Analyze the particular job involved and determine its purpose and essential functions.

2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation.

3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

A comprehensive Technical Assistance Manual on Title II is available from the U.S. Department of Justice, Civil Rights Division, Office on the Americans with Disabilities Act, P.O. Box 66118, Washington, DC 20035-6118.

If such a conference still does not reveal an appropriate accommodation, the school administrator may wish to seek technical assistance from a variety of state agencies or from one of the federal Regional Resource Centers.

Once hired, a teacher, counselor, para-professional or non-professional in the school who has a disability may require a number of kinds of reasonable accommodations. These might include the acquisition of auxiliary devices, removal of architectural barriers, physical adjustments to the classroom, hiring a sign language interpreter, providing large print materials, or providing attendant care. Because, by its nature, education involves the care of children, it would be difficult for a school to be able to provide an alternative schedule for a teacher. However, job restructuring and alternative work scheduling could be considered as options in accommodating other professional and non-professional positions.

3) Medical Examinations and Drug Testing

The school administrator may not make inquiries into the medical condition of an applicant who is a qualified individual with a disability, except to make general inquiries as to the person's ability to perform the duties of the position. This includes a prohibition against asking an applicant how frequently he/she may need to miss work as a result of a disability.

It is allowable, however, for a school administrator to require a drug test of all applicants for a position. It should be noted, however, that an individual who is known to have used illegal drugs, but who has successfully completed a program of rehabilitation and who is not currently using illegal drugs cannot be denied employment on this basis.

However, because a school can lose its eligibility for federal funding under the Drug Free Schools and Communities Act for failure to maintain anti-drug use policies, school administrators should be extraordinarily careful not to hire an individual who is currently using illegal drugs. Therefore, drug testing for all

prospective employees might be considered as a useful policy to avoid liability under that statute.

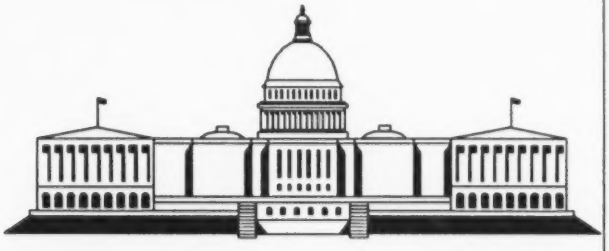
Only if an examination for a disability can be shown to be job-related may a school or educational agency require a medical examination of an employee.

Special rules apply to situations where an individual has been selected for a position, but has not yet begun to work as an employee. In such an instance, an employer may require a medical examination and may condition an offer of employment under certain circumstances:

1) If all entering employees are subject to the same conditions.

2) If all records are maintained in separate files and are held confidentially, except that such information may be shared internally with appropriate staff if necessary restrictions on work are required, or if a disability exists that may require emergency care.

TITLE II: PUBLIC SERVICES



Discrimination Prohibited by State and Local Governments

This Title of the ADA generally prohibits discrimination against individuals with disabilities which exclude such persons from participation or deny them benefits of the services, programs, or activities of a public entity, or be discriminated against by any such entity. This includes liabilities for 1) State and local governments, 2) any department, agency, special purpose district, or other instrumentality of a State, States or local government.

A public entity must make reasonable modifications to its policies, practices, or procedures to avoid discrimination, unless such a modification would fundamentally alter the nature of its service, program, or activity create undue financial and administrative burdens. (See discussion of "Undue hardship" under Title I.)

There is the possibility that alterations to existing facilities will be necessary to insure physical access. Examples of such modifications may include:

- Van accessible parking spaces
- Elevated walkways
- Lowered drinking fountains
- Adjusted shelves and storage areas
- Volume controls on telephones
- Installation of bathroom stalls
- Replacement of carpeting

It is important to note that these physical alterations to existing structures is only required if the modification is "readily achievable". However, where a physical modification is not readily achievable, an alternative accommodation must be found to allow access to the public program.

Subtitle B of Title II prohibits discrimination by providers of public transportation, but specifically excludes public school transportation (which is already covered by Section 504).

What are the implications for education officials under Title II?

The rights of individuals under this Title are modeled after those rights and privileges existing under Section 504. However, there remain implications for education officials at all levels under Title II.

Provision of Special Education Services

One demand on local agencies will likely be an increase in requests for public hearings to determine student eligibility for special education. Potential demands on schools will include providing services to a greater number of children than currently served.

Requests initiated by adults on their own behalf may increase under the ADA. Because the local public school usually offers programs and opportunities that involve adults within the community, it should be expected that adults with disabilities will desire greater participation as a direct result of the enactment of the ADA. This may increase the public school's responsibilities for providing physical access to facilities than currently exists. It may also require other arrangements, such as the acquisition of devices to insure the equitable participation of these individuals.

> *"A natural evolution of the ADA and, in fact, the success of the last decade under P.L. 94-142, is a change in the expectations of children leaving school in that they will desire to participate in their communities as any other adult. The school, as the primary community center, is the location of a variety of public events as well as programs of continuing education. Adults with disabilities will want to use those facilities as both an opportunity of furthering their own abilities as well as participating generally as members of society."*
>
> *Lawrence Gloeckler*
> *New York State Department of Education*

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New demands respecting transportation of children with disabilities may be expected. As noted above, Title II excludes school transportation from coverage under the ADA. However, because the ADA encourages the full participation in society of individuals with disabilities, an increase in parental requests for children with disabilities to participate in school activities may result. These activities could involve greater participation in school sponsored field trips or athletic events. This increased participation will require transportation. Although not covered under the ADA, the rights of these children to transportation are clearly established under Section 504.

Office for Civil Rights Will Enforce Title II

One unique feature of Title II is that enforcement under this title will be carried out by the Office for Civil Rights, while the remainder of the Act is enforced through other federal agencies, including the Equal Employment Opportunity Commission and the Department of Justice. The potential ramifications of this difference is unclear at this time.

Enforcement Authorities	
Title I	Equal Employment Opportunity Commission
Title II	Office of Civil Rights (U.S.E.D.)
Title III	Federal Courts (through private legal action); or the U.S. Attorney General
Title IV	Federal Communications Commission

TITLE III: PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Five Classes of Discriminationare Prohibited

Title III prohibits discrimination against individuals with disabilities in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations by any person who owns, leases (or leases to operate) a place of public accommodation.

Numerous private entities are considered public accommodations for the purposes of the ADA. Notably, among these are nursery, elementary, secondary, undergraduate or graduate private schools, or other places of education.

Discrimination includes 1) Denial of participation, 2) participation in unequal benefit, 3) separate benefit, or 4) defining an individual or class of individuals.

Further, services must be provided in an integrated setting appropriate to the individual with a disability. It is prohibited to deny the opportunity of an individual with a disability to participate in programs that are not separate or different. It is prohibitory to utilize administrative methods that have the effect of discriminating against individuals with disabilities. Finally, it is prohibited for a private entity to discriminate against a person with a disability because of a known relationship or association.

The ADA identifies five classes of discrimination that are prohibited.

"1) The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of goods, services, facilities, privileges, advantages, or accommodations being offered.

2) A failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

3) A failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

4) A failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installa-

tion of a hydraulic or other lift), where such removal is readily achievable.

5) Where an entity can demonstrate that the removal of a barrier under paragraph (4) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable."

Implications for Public and Private Schools

Public Schools — The prohibitions against discriminations provided in Title III may greatly increase interest among individuals with disabilities enrolled in public elementary and secondary schools to participate in school functions (such as field trips, recreational offerings or athletic events).

Private Schools — There are significant implications in this Title, however, for private elementary and secondary schools, particularly those that have not previously participated in federal programs and thus have not been covered under Section 504 or the IDEA.

These implications include admissions testing, removal of barriers, educational placements, educational services, extracurricular programs, acquisition of devices, and transportation of course, the same standards of reasonable accommodation and undue hardship and "readily achievable" would apply to these schools in terms of barrier removal, alteration to transportation vehicles, etc.

Under the ADA, private elementary and secondary schools will now be held to much the same standard that has previously existed for public schools in insuring the equal treatment and provision of equal opportunity for children with disabilities, except that admission is not required for individuals that do not meet established educational standards.

TITLE IV: TELECOMMUNICATIONS

All Common Carrier Telecommunications Services Must Be Accessible

Title IV relates specifically to telecommunications provided by common carriers, including wire, radio, television and telephone.

Generally, the Act requires that all common carrier telecommunication services be accessible and available to individuals with disabilities. This includes the installation and use of TDD devices for wire, radio and telephone; and closed-captioning services for television.

What are the implications for educators under Title IV?

There is no direct obligation created for education officials under Title IV, as it applies specifically to common carrier telecommunication systems. However, with the increasing use of technological devices and educational technology in the education of students, generally, these new requirements may render children with disabilities able to participate in some educational services that before were foreclosed to them. Further, because the requirements of Title IV directly affect the quality of life for people with disabilities, and because the purpose of education is to prepare students for adulthood, schools should consider instituting training programs for students with disabilities in the use of these devices.

TITLE V: PERSONS ENGAGED IN ILLEGAL DRUGS ARE EXCLUDED FROM ADA

Title V contains numerous miscellaneous provisions that relate to the other four Titles of the Act, and which have been discussed earlier in this paper. However, it is worth noting that Title V amends Section 504 by narrowing the definition of disability and excluding from coverage individuals who are currently engaged in the use of illegal drugs.

Education officials should consider this particular aspect of the miscellaneous provisions of the ADA relating to illegal drug use, in that it follows other recently enacted legislation focusing on the federal interest in preventing the use of illegal drugs in society, generally. While not related to the education of children with disabilities, officials, at all levels, should develop specific policies for preventing the use of illegal drugs and the inappropriate use of alcohol in schools and educational agencies.

GENERAL IMPLICATIONS AND RECOMMENDATIONS

Because the purpose of the ADA is to insure full participation in society for individuals with disabilities expectations

have greatly increased among such individuals for a more fulfilling experience in life's rewards.

Although many of the legal requirements included in the Act previously existed under other federal statutes, the principles for which the ADA stands coupled with the heightened sensitivity among all people of the needs of individuals with disabilities can be expected to result in increased demands by these individuals and keener understanding of their rights under federal law. Therefore, schools should be pro-actively prepared to meet their responsibilities for serving these individuals. Educators should expect increased demands in the areas of:

- *children requesting special education services in regular education;*
- *equal employment opportunities by individuals with disabilities;*
- *physical access to school facilities by individuals, including adults;*
- *participation by students with disabilities in extra-curricular opportunities.*
- *participation by adults in school and community functions and in continuing education programs.*

Recommendations

To be prepared to meet the challenges facing educators under the ADA, these are some of the steps that should quickly be taken:

- *develop policies and procedures for insuring equal employment opportunities;*
- *identify State specialists in assistive technology devices;*
- *identify local experts in the area of barrier removal to assess your facilities;*
- *identify and access sources of technical assistance such as appropriate state and local officials and federal regional ADA centers;*
- *review and analyze employment practices compared to the requirements of the ADA; and*

Review the role of schools in assisting students with disabilities to be aware of their rights beyond the educational experience in the areas of public accommodation, transportation and communication.

Possible Remedies/Liabilities	
Title I	Injunctive, relief including, hiring and equitable, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorney's fees, expert witness fees and court costs. Compensatory and punitive damages (in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.
Title II	Private civil action in Federal court, including injunctive and equitable relief, and recovery of attorney's fees.
Title III	Injunctive relief (in cases brought by private parties. Civil Penalties (in cases brought by the Attorney General.) — $50,000 maximum for first violation — $100,000 maximum for each subsequent violation
Title IV	Administrative remedy through the Federal Communications Commission, reviewable in Federal Court.

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